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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ANTHONY GALLARDO,

Plaintiff and Appellant,

v.

NEW ALTERNATIVES, INC.,

Defendant and Respondent.

G054940

(Super. Ct. No. 30-2015-00809270)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Martha K. Gooding, Judge. Affirmed.

Law Office of Peter R. Nasmyth, Jr. and Peter R. Nasmyth, Jr. for Plaintiff and Appellant.

Wilson, Elser, Moskowitz, Edelman & Dicker, and John R. Clifford and Kelly A. Van Nort for Defendant and Respondent.

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This case arises from the tragic death of fifteen year old Erica Gallardo, who ran away from a group home operated by respondent New Alternatives, Inc., and then died from an overdose of methamphetamine six days later. The man who sold the methamphetamine to Erica later pleaded guilty to manslaughter. Erica's¹ father, Anthony Gallardo, sued New Alternatives, alleging it was liable for Erica's wrongful death because it had negligently allowed her to run away from its facility.

The trial court granted summary judgment in favor of New Alternatives and Gallardo appeals, arguing that because the trial court sustained several of his objections to the evidence submitted by New Alternatives in support of its motion, New Alternatives necessarily failed to sustain its initial burden of proof in seeking summary judgment. We disagree. The trial court made clear it sustained only foundational objections to the portion of a declaration purporting to establish what New Alternatives' employees had done in the wake of Erica's departure, and whether those actions complied with the requirements of its written Runaway Plan, which was not in evidence. As the trial court pointed out, however, those issues are not material in determining whether New Alternatives was negligent in allowing her to run away in the first place.

We are likewise unpersuaded by Gallardo's contention that there are triable issues of fact concerning New Alternatives' compliance with regulations that might have been effective in preventing Erica from running away. Generic regulations requiring a group home to provide necessary care and supervision cannot override specific regulations prohibiting the group home from restraining or prohibiting a resident from leaving. Further, there is no evidence in the record that New Alternatives (as opposed to Erica's social worker) was aware Erica may have had a history of methamphetamine use

¹ Because Erica shared the same last name as her father, the appellant herein, we refer to her by her first name for the sake of clarity. No disrespect is intended.

and of running away, and thus its liability cannot be based on its failure to take specific measures in light of that history.

Finally, even if Gallardo's other arguments were well taken, we would nonetheless affirm the judgment. An order granting summary judgment is presumed correct, and will be upheld on any ground raised in the motion, even if it is not the ground relied on by the trial court. Thus, it was incumbent on Gallardo, as appellant, to demonstrate why summary judgment could not have been properly granted on any of the grounds raised by New Alternatives—including New Alternatives' assertions that it had no duty to protect Erica from unforeseen criminal acts of third parties, and that its negligence, if any, was not a proximate cause of Erica's death. By ignoring those assertions entirely, Gallardo waived any contention that summary judgment was not properly granted.

FACTS²

In 2010, Erica was removed from her parents' custody by the County of Orange (the County). The juvenile court later terminated efforts to reunify Erica with her parents, and she was placed in long-term foster care. After living in several different

² Every appellant's opening brief is required to include a "summary of the significant facts limited to matters in the record." (California Rules of Court, rule 8.928(a)(2)(C).) Gallardo ignores this requirement, providing us with only a brief procedural summary that identifies his claim against New Alternatives as one alleging wrongful death, but otherwise omits any reference—or any citations—to the underlying facts. His opening brief fails to disclose the identity of the person who died or how New Alternatives allegedly played a part in that death. Moreover, Gallardo makes no effort to ameliorate that problem by providing factual context for the assertions made in the argument portion of his brief. It is not the appellate court's job to review the entire appellate record to ascertain the nature of the dispute and the factual context relevant to appellant's claims of error: "[I]t is counsel's duty to point out portions of the record that support the position taken on appeal. The appellate court is not required to search the record on its own seeking error." (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768.)

places within the dependency system, including a month at New Alternatives in May 2013, Erica was again placed at New Alternatives in July 2013.

On September 10, 2013, Erica, along with V.A.,³ another resident of New Alternatives, “suddenly bolted from a side gate” at the facility. New Alternatives promptly notified the City of Orange Police Department and filed a missing person’s report.

Erica went to her grandmother’s home and contacted her mother the following day. In turn, Erica’s mother contacted Erica’s social worker and told her she had made arrangements to pick up Erica from her grandmother’s house. The social worker arranged for Erica to be placed at another facility. However, Erica left her grandmother’s house before her mother arrived to transport her to the new facility. On September 12, Erica’s social worker prepared and submitted an ex parte application for issuance of a protective custody warrant for Erica.

After Erica left her grandmother’s house, she met up with V.A., the resident with whom she had run away from New Alternatives. V.A.’s uncle gave the girls a ride. Erica did not want to return to New Alternatives, so he acquiesced in her request that he drop her off in an alley, while V.A. returned to New Alternatives.

At some point after parting from V.A., Erica met up with another friend, T.A., who introduced her to Jeffrey Peurrung, the man who provided her with methamphetamine. Erica died on September 16, 2013, six days after leaving New Alternatives, as a consequence of a methamphetamine overdose.

Following Erica’s death, Peurrung was arrested. He later pleaded guilty to charges including involuntary manslaughter in connection with Erica’s death. Peurrung is not an employee of New Alternatives and was not otherwise known to New Alternatives.

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We refer to other juveniles by their initials to protect their privacy.

In September 2015, Gallardo, along with Erica's two siblings, filed a complaint alleging causes of action against Peurrung, the County, and New Alternatives. Erica's siblings later dismissed their complaint, and Gallardo remained the only plaintiff in the action.

In February 2016, Gallardo filed his first amended complaint. He alleged causes of action for wrongful death against Peurrung and New Alternatives, and a cause of action for failure to discharge a mandatory duty against the County. As against New Alternatives specifically, Gallardo alleged it was responsible for Erica's death because it "negligently supervised and cared for [Erica] during her custody, which allowed [her] to run away, and ultimately caused her death." He further alleged New Alternatives violated duties owed to Erica, including but not limited to those established by 22 California Code of Regulations, sections 89377, 89378 and 89388,⁴ and his amended complaint quotes specific provisions of those regulations purporting to establish the standards applicable to New Alternatives.

Gallardo then alleged that "[a]s a direct and legal result of the negligence per se of [New Directions]", his daughter, Erica "died, and her death has caused, and continues to cause, [him] great mental, physical, emotional, and nervous pain and suffering."

On September 19, 2016, the County filed its motion for summary judgment, which was set for hearing on December 5, 2016. Among other arguments, the County asserted that because New Alternatives is a group home, rather than a foster home, the County has no licensing or oversight responsibility in connection with it.

A week later, New Alternatives filed its motion for summary judgment, which was set for hearing on December 12, 2016. New Alternatives' motion was also

⁴ All further regulatory references are to Title 22 of the California Code of Regulations and will be referred to as "Reg."

based, in part, on the assertion that its facility is a group home, rather than a foster home. It therefore argued that applicable regulations prohibited it from locking in its residents and from physically restraining residents to prevent them from running away. New Alternatives also argued it was entitled to summary judgment on the separate and distinct grounds that: (1) it had no duty, as a matter of law, to protect Erica from the unforeseeable criminal act of Peurrung; (2) its negligence, if any, was not a substantial factor in bringing about Erica's death by overdose; and (3) its negligence, if any, was superseded by the independent wrongful acts of others in the six days after Erica left its facility.

Shortly before Gallardo's deadlines to file opposition to the two motions for summary judgment, he filed an ex parte application seeking leave to file a second amended complaint, adding a new party, as well as new allegations of regulatory breaches applicable to group homes, rather than foster homes. In his application, Gallardo claimed that he had "learned for the first time" that New Alternatives' facility was not a foster home after reviewing the County's motion. The County filed a written opposition to the ex parte application arguing that Gallardo had previously been notified of New Alternatives' group home status thru interrogatory responses.

The trial court denied Gallardo's request for leave to file a second amended complaint, concluding his delay in seeking leave was "unexplained, unreasonable, and unjustified," and that both defendants would be prejudiced by granting his request.

Gallardo opposed New Alternatives' motion for summary judgment, interposing objections to some of the evidence it submitted in support of the motion, and arguing there were triable issues of fact relating to New Alternatives' compliance with the regulations applicable to group homes.

On December 12, 2016, the court heard oral argument and took New Alternatives' motion under submission. Thereafter, the court issued an order granting the motion. In its ruling, the court sustained Gallardo's objections to the parts of a witness's

declaration purporting to establish what New Alternatives' employees did in the wake of Erica's departure, on the ground the witness failed to establish proper foundation for his testimony regarding those facts. The court also sustained Gallardo's objections to other parts of the same witness's declaration that attempted to summarize the provisions of New Alternatives' written "Runaway Plan," which was not attached to the declaration. Finally, the court sustained Gallardo's objection to that same witness's attempt to summarize the regulatory restrictions applicable to group homes such as New Alternatives.

On the merits, the court noted it was undisputed that New Alternatives' facility was a "group home," and thus, pursuant to Reg. 89377(b), Erica could not be involuntarily locked in the facility. Pursuant to Reg. 84322.2, New Alternatives was expressly "prohibited from preventing a child from leaving the facility by locking the child in a room or any part of the facility." The court acknowledged Gallardo's contention that under Reg. 80072(a)(6)(B), Erica did not have the right "to leave or depart the facility at any time" as an adult would, but noted there was a difference between her right to leave and the facility's right to affirmatively restrain or prevent her from doing so. Based on those regulations and the undisputed fact that Erica "suddenly bolted" from the facility, the court concluded New Alternatives could not be found negligent for failing to prevent her from running away.

The court also explained that "[a]lthough New Alternatives' recitation of the events that purportedly took place afterward to find her are not admissible, . . . the events that occurred afterwards are not material to this finding. Based on the regulations, New Alternatives had no right to prevent Erica's departure in this manner in the first place, and . . . it would have been in violation of the applicable regulations had it attempted to do so."

The court further reasoned that New Alternatives had no duty of care to protect Erica from Peurrung's criminal act because there was no evidence his crime was

foreseeable. The court noted Gallardo's contention that New Alternatives was aware Erica had a prior drug history and a history of running away from foster care placements, but concluded there was no actual evidence to support that contention.

The court entered judgment in favor of New Alternatives on March 8, 2017.

DISCUSSION

1. *Standard of Review*

“Code of Civil Procedure section 437c, subdivision (c) provides that summary judgment is properly granted when there is no triable issue of material fact and the moving party is entitled to judgment as a matter of law.” (*Global Hawk Ins. Co. v. Le* (2014) 225 Cal.App.4th 593, 600 (*Global Hawk*).) When a defendant moves for summary judgment, it meets its initial burden by presenting evidence showing the plaintiffs' causes of action have no merit or are precluded by an affirmative defense. (Code Civ. Proc., § 437c, subd. (p)(2).) If the defendant makes that initial showing, the burden shifts to the plaintiff to show a triable issue of material fact exists. (Code Civ. Proc., § 437c, subd. (p)(2).)

We review the trial court's ruling de novo (*Moua v. Pittullo, Howington, Barker, Abernathy, LLP* (2014) 228 Cal.App.4th 107, 112 (*Moua*)), and we are required to construe “the evidence in the light [most] favorable to the opposition to the motion . . . while strictly scrutinizing the successful party's evidence and resolving any evidentiary ambiguities in the opposition's favor.” (*Dameron Hospital Assn. v. AAA Northern California, Nevada & Utah Ins. Exchange* (2014) 229 Cal.App.4th 549, 558.)

However, “[o]n review of a summary judgment, the appellant has the burden of showing error, even if he did not bear the burden in the trial court. [Citation.] ‘The fact that we review de novo a grant of summary judgment does not mean that the trial court is a potted plant in that process.’” (*Claudio v. Regents of University of California* (2005) 134 Cal.App.4th 224, 230 (*Claudio*).) Thus, as with every other order,

we will affirm a summary judgment if it is correct on any ground asserted in the motion, as we review the order, not its rationale. (*Moua, supra*, 228 Cal.App.4th at p. 112.)

Significantly, “[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant’s responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. In other words, review is limited to issues which have been adequately raised and briefed.” (*Claudio, supra*, 134 Cal.App.4th at p. 230.) Consequently, the appellant’s failure to affirmatively demonstrate that summary judgment would be improper on each of the grounds asserted by the moving party, amounts to a waiver.

2. *The Effect of Gallardo’s Sustained Objections*

Gallardo first argues that because the trial court sustained 12 of his 14 evidentiary objections, New Alternatives necessarily failed to establish “each of the following [twelve] alleged undisputed facts in support of the Motion.” He does not, however, disclose what his objections were, how any of the sustained objections relate to those listed facts, or even how any of those facts relate to the motion for summary judgment.

As we have already noted, the trial court made clear in its ruling that the objections it sustained related solely to the evidence of what New Alternatives had done in the wake of Erica’s departure from the facility, and were unrelated to whether it breached any duty by “allow[ing her] to run away,” which is the claim alleged in Gallardo’s first amended complaint. Gallardo does not explain why the trial court’s analysis on that point would have been erroneous, and we conclude it was not.

As explained in *Oakland Raiders v. National Football League* (2005) 131 Cal.App.4th 621, “the pleadings set the boundaries of the issues to be resolved at summary judgment.” “A summary judgment or summary adjudication motion that is

otherwise sufficient ‘cannot be successfully resisted by [creating] immaterial factual conflicts outside the scope of the pleadings.’” “Thus, a plaintiff wishing ‘to rely upon unpleaded theories to defeat summary judgment’ must move to amend the complaint before the hearing.” (*Id.* at p. 648.)

Thus, because Gallardo never alleged New Alternatives was negligent in the manner in which it responded after Erica ran away, he cannot defeat summary judgment by arguing there are disputed facts relating to the adequacy of that response. Those facts are immaterial to the summary judgment motion. “[O]nce a party bears the initial burden of demonstrating an entitlement to judgment as a matter of law, the opposing party may not defeat summary judgment by attempting to generate a factual dispute as to immaterial issues: ‘The presence of a factual dispute will not defeat a motion for summary judgment unless the fact in dispute is a material one.’” (*Romero v. American President Lines, Ltd.* (1995) 38 Cal.App.4th 1199, 1203.)

3. *The Existence of Triable Issues of Fact*

Gallardo also contends there are triable issues of material fact regarding New Alternatives’ compliance with general regulatory standards applicable to group homes, including the requirement that the facility manager apply the “Reasonable and Prudent Parent Standard” (Reg. 84067) and that the facility “provide care and supervision as necessary to meet the client’s needs.” (Reg. 80078(a).) But Gallardo makes no effort to explain how those standards might have obligated New Alternatives to do anything different than it did to prevent Erica from running away.

Instead, Gallardo points to Reg. 80072(a)(6)(B)—as he did in the trial court—to demonstrate Erica did not have the same right that an adult group home resident would have to leave the facility at any time. We agree, but as the trial court pointed out, the fact Erica had no right to leave does not establish that New Alternatives had the right to stop her if she attempted to do so.

Gallardo also points out the trial court sustained his objection to the evidence underlying New Alternatives' claimed undisputed fact that "[i]n accordance with California law, each resident has personal rights and is free to abscond from [New Alternatives] if they elect to do so." However, we reject Gallardo's contention that the assertion is consequently a disputed fact that precludes summary judgment. Indeed, it is not an issue of fact at all; rather, it is an issue of law that the court was empowered to resolve.

Finally, Gallardo asserts that summary judgment was improper because "it is also undisputed that [New Alternatives] knew that [Erica] had previously run away from placements and that she was using illegal drugs, including methamphetamine," thus triggering a duty to develop an "individualized plan" for her. But the evidence he cites in support of that assertion—the declaration of Erica's social worker—fails to establish that New Alternatives was aware of either of those things. Nowhere in the social worker's declaration does she state that Erica's history of running away or possible drug use was disclosed to New Alternatives.⁵

Based on the foregoing, we reject Gallardo's contention that there are triable issues of material fact bearing on his claim that New Alternatives' negligent care allowed Erica to run away from its facility.

4. *Gallardo's Failure to Challenge Other Grounds for Summary Judgment*

Finally, even if the arguments presented in Gallardo's opening brief were well taken, we would nonetheless affirm the judgment. As we have already explained, an order granting summary judgment is entitled to the same presumption of correctness as

⁵ The declaration does not actually establish that Erica had a substantial history of methamphetamine use. It demonstrates only that she was once taken to the emergency room because she "appeared to be under the influence of methamphetamine."

any other order, and it will be upheld on any ground raised in the motion, even if it is not the ground relied upon by the trial court.

Thus, it was incumbent on Gallardo, as appellant, to demonstrate why summary judgment could not have been properly granted on any of the other grounds raised by New Alternatives – including New Alternatives’ assertions that it had no duty to protect Erica from unforeseen criminal acts of third parties (See *Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1149-1150; *Margaret W. v. Kelley R.* (2006) 139 Cal.App.4th 141, 152-153), and that its negligence, if any, was not a proximate cause of Erica’s death. (*Hardison v. Bushnell* (1993) 18 Cal.App.4th 22, 27.) Gallardo addressed neither of those points. By ignoring those alternative grounds for summary judgment entirely, Gallardo waived any contention that summary judgment was not properly granted.

DISPOSITION

The judgment is affirmed. New Alternatives is to recover its costs on appeal.

GOETHALS, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.